S.B.CIVIL MISC. APPLICATION NO.26/2003

Shivdan Singh
vs.
Dulehey Singh and others.

DATE OF ORDER ::: 12.1.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Suresh Srimali, for the applicant.
Mr. KN Joshi, for applicant Smt. Shakuntala

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Heard learned counsel for the parties.

In S.B. Civil First Appeal No.2/1985, on moving application by one of the legal representatives of the sole plaintiff/respondent Dulehey Singh, the Court vide order dated 15.1.2003 held that the appeal has abated. In the order dated 15.1.2003, there is mention of death of appellant Shivdan Singh alone who expired on 10.11.1996 but it appears from the application dated 12.4.1999 that applicant Smt. Shakuntala in para no.2 thereof clearly stated that the plaintiff/respondent no1. Dulehey Singh also had expired on 17.10.1991 (wrongly mentioned the year 1981 in place of 1991 which is apparent from Annexure-A appended with the application). The applicant also stated in the application that since the legal representatives of plaintiff Dulehey Singh and also of the appellant Shivdan Singh have not been brought on record within the stipulated

period of limitation, therefore, this appeal stands abated and hence, deserves to be dismissed.

In the order, it has also been mentioned that even in the suit pending for final decree before the trial court, no application for substitution of the legal representatives has been submitted by any of the parties. This Court, after hearing both the parties as well as the applicants, dismissed the appeal as abated by order dated 15.1.2003.

After the order dated 15.1.2003, this application for setting aside abatement of appeal under Order 22 Rule 9 CPC has been filed by one of the legal representatives of appellant Shivdan Singh on 13.2.2003. In the application, it is admitted that Shivdan Singh expired on 10.11.1996 and the respondent no.1 Dulehey Singh also expired on 17.10.1991. According to the applicant, the appeal was dismissed by this Court because it was submitted before this Court on behalf of Smt. Shakuntala that the parties have not been substituted in the suit whereas after the order dated 15.1.2003, Smt. Shakuntala herself submitted an application before the trial court and prayed that the final decree may be passed. However, the trial court dismissed the said application on the ground that before the High Court, she herself submitted that no steps have been taken in the trial court for substitution of deceased parties. Learned counsel Mr. K.N. Joshi submits that the rejection of the application of Shakuntala by the trial court is under challenged as Smt. Shakuntala has preferred S.B. Civil Writ Petition No.6534/2003 to challenge the said

order.

According to learned counsel Mr. Joshi, in the facts, it is clear that the appellant's advocate expired during the pendency of the first appeal and when the applicant received a letter dated 15.1.2003 from counsel Shri S.N. Pungalia, he came to know about all the facts and, therefore, he has submitted this application for setting aside of the abatement of S.B. Civil First Appeal No.2/1985. It is also submitted that Smt. Shakuntala wants to proceed with the suit and she herself submitted an application before the trial court for passing of the final decree, therefore, in such facts and circumstances, the abatement of appeal can be set aside.

Learned counsel Mr. Joshi vehemently submits that the appeal abated on 17.10.1991 on the death of the respondent no.1 Dulehey Singh who was the sole plaintiff and decree is in favour of respondent no.1/plaintiff. Said decree, after his death is in favour of his legal representatives and attained the finality on abatement of appeal against the respondent no.4. According to learned counsel Mr. Joshi, for abatement of the appeal, no order of the Court is needed and the litigation abates that on the day of death of the party. In this case, the appeal abated in the year 1991 and even after 14 years, no application has been filed for setting aside of abatement of the year 1991 that too the abatement which took place on account of the death of the sole plaintiff. Even in the application dated 13.2.2003 filed under Order 22 Rule 9 CPC by the applicant, neither

the applicant pleaded that the legal representatives of sole plaintiff be impleaded as party nor any prayer has been made for setting aside of abatement of the appeal dated 17.10.1991. It is also submitted that the applicant's moving application for passing final decree before the trial court is entirely separate matter, then moving application for being impleaded as party in the suit. It is also submitted that when the preliminary decree has been passed, the Court is required to pass the final decree and the proceedings for final decree can proceed.

I have considered the submissions of both the learned counsel and perused the facts of the case.

It is not in dispute that the sole plaintiff died on 17.10.1991 and no application for setting aside of the said abatement has been moved by the appellant till he died on 10.11.1996 nor any of the legal representatives of the appellant submitted application for setting aside of abatement of the year 1991 till date and about 14 years have passed, therefore, when the appeal has abated in the year 1991, the order dismissing the appeal due to the death of sole appellant on 15.1.2003 cannot be set aside because the abatement of the appeal due to the death of sole appellant, if set aside, then the appeal will remain abated due to the death of sole respondent who expired on 17.10.1991.

Otherwise also, the reason given by the applicant for moving the application before this Court on 13.2.2003 for

setting aside of abatement due to death of appellant Shivdan Singh by order dated 15.1.2003, I do not find any reason for setting aside the said abatement. The appellant preferred appeal in the year 1985 and the applicant took a plea that the sole appellant was deaf and dumb since the age of 4 years and had undergone brain surgery in the month of May, 1994. In view of the above, it is clear that said appellant Shivdan Singh must have been assisted by some legal representatives in preferring the appeal and conducting the appeal. No reasonable cause has been shown for even namesake for not moving the application by deceased Shivdan Singh for bringing on record the legal representatives of even appellant Dulehey Singh who expired on 10.11.1996 and Smt. Shakuntala, one of the legal representatives of Dulehey Singh submitted an application on 12.11.1999 that the appeal has been abated.

In view of the above, the application for setting aside the abatement is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya